No. 1693

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant
v.
HOMER G. JOHNSON
Appellee

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

CARL C. DONAUGH,
United States Attorney,
506 U. S. Court House,
Portland, Oregon,
J. ROBERT PATTERSON,
Assistant United States Attorney,
Attorneys for Appellant.

JOHN LICHTY and
EDWARD DOXEY,
Failing Bldg.,
Portland, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

Page

STATUTES CITED

OTHER REFERENCES

No. 1693

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant

v.

HOMER G. JOHNSON

Appellee

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

This action arose out of a written contract entered into by and between the appellant and the appellee on or about May 27, 1937. By the terms of the contract the appellee was authorized to construct a road for the distance of 16.16 miles on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lasson National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California.

The action arose under the Act of March 3, 1887, c. 359, Sections 1, 2, 24, Stat. 505, as amended; U.S.C.,

Title 28, Sect. 41 (20), commonly known as the Tucker Act. The appellee obtained judgment in the District Court and an appeal is taken to this Court by virtue of U.S.C. Title 28, Sect. 226, Act of February 13, 1925, c. 229, Sec. 4, 43 Stat. 939.

On or about the 28th day of April, 1937, the appellant issued a call or invitation for bids for the construction of the highway. Upon request of prospective bidders, plans and specifications prepared by appellant were furnished, which supplied the bidders with information upon which to base their bids. The following provision was included in the specifications:

> "—2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

The appellee obtained a copy of the specifications and also examined the site of the project. (Tr. 114) He further submitted a bid which was accepted by the appellant on or about May 27 1937, and a written contract was entered into between the parties at that time.

The appellee received notice by telegram on June 9, 1937, to proceed with the construction within 10 days thereafter. Sometime around June 16th the ap-

pellee arrived at the scene of the project and started moving in equipment. (Tr. p. 84) After drilling some holes at the place were gravel was to be obtained, the appellee encountered some soft rock. Representatives of the appellant visited the scene and along with the appellee it was decided that, although this rock was not going to be as good as expected, it would be adequate for the purpose. (Tr. p. 87) The appellee then proceeded to work the quarry and set up his crushing plant and produced a portion of the crushed rock. A question again arose as to the quality of the rock but it was finally decided that the rock was adequate. The appellee then stripped and blasted the quarry in order to produce the rock for the contract. During this time the appellee also produced rock from the gravel pit, designated as Station 870 in the specifications. A total of 47,000 tons of rock was used in completing the contract. (Tr. p. 226) The gravel pit was worked 23 days and about 24,890 tons of crushed rock was produced there. (Tr. pp. 182, 226, 221) Some 20,097 tons were produced at the quarry or station 1239, as designated by the specifications. (Tr. pp. 183, 215, 221, 222) After the appellee moved to Upper Bear Creek, about 4,000 tons of cover rock were produced to finish the construction. (Tr. p. 215) The distance the appellee moved from station 1239 to face No. 2 on Upper Bear Creek was 450-700 feet.

Appellee did not complete his construction on October 20, 1937, as required, and on November 5, 1937,

was forced to close down operations due to bad weather. On June 16, 1938, appellant gave appellee notice to proceed and on June 20, 1938, appellee continued his operations, completing the contract on August 21, 1938. The appellee presented a claim to the District Engineer but it was decided adversely to appellee on June 15, 1939. The appellee appealed the claim to the Commissioner of Public Roads at Washington, D. C., on May 13, 1941, but the Commissioner refused to consider the previous ruling of the District Engineer, for the reason that the appellee had failed to appeal from the District Engineer's decision within 30 days as provided by Article 15 of the contract. (Tr. p. 124) The appellee then filed this action on December 7, 1942, over four years after completing the contract.

The appellee in an amended complaint claimed damages in the amount of $14,994.72 for the breach of contract by the appellant. He only prayed for judgment in the amount of $10,000. His amended complaint contained 8 different elements or different claims as damages for breach of contract aggregating $14,994.72. (Tr. pp. 15-17)

The Court returned a verdict of $9,999.99 in favor of the appellee and allowed the four following elements of damages from the eight claimed in the amended complaint:

1. $1,575.00—the amount of liquidated damages assessed against the appellee by appellant for

his failure to complete the contract on time.

2. $956.48—cost of hauling cover material from the gravel pit which would not have been incurred had Station 1239 been adequate.
3. $4,618.34—extra cost of producing cover material from the gravel pit which would not have been incurred had Station 1239 been adequate.
4. $2,850.17—cost of reshaping the gutters and roadways in 1938 which had been done once in 1937 and which would not have been necessary had the appellee been able to finish the work in 1937 and his failure to finish in 1937 was due to the breach of contract by appellant, that is, the rock at Station 1239 was not the same quality as represented by the specifications.

The appeal is brought to this Court by the appellant's challenging the correctness of certain findings of the District Court.

ASSIGNMENT OF ERRORS

We believe that the lower court erred in rendering judgment for the appellee for the following reasons:

1. The district court erred in holding that it retained jurisdiction under the Tucker Act (Act of March 3, 1887, as amended, Judicial Code, Section 24 (20), Title 28 U.S.C. Section 41 20)) after the complaint was amended during trial to present claims exceeding $10,000.00.
2. The district court erred in holding that the claims presented in the amended complaint did

not exceed $10,000.00 within the meaning of the Tucker Act.

3. The district court erred in holding that a complaint containing interchangeable, alternative claims exceeding $10,000.00 in the aggregate is brought within the limitations on the jurisdiction of district courts under the Tucker Act by waiver of judgment in excess of $10,000.00.

4. The district court erred in holding that the Tucker Act jurisdictional limitations should be circumvented by permitting amendment of the complaint for the stated purpose of assuring judgment in the amount of the jurisdicitional maximum even if some items of claim allowed by the district court were disallowed on appeal.

5. The district court erred in holding that paragraph 2.2 of the specifications attached to the contract would reasonably induce the belief that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

6. The district court erred in construing said paragraph 2.2 as constituting a representation or warranty that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

7. The district court erred in not holding that said paragraph 2.2, read in its entirety, expressly as well as by clear implication negatived any representation and prevented reasonable reliance on the first sentence therein as a representation or warranty that an adequate supply of suitable rock was obtainable from the source to the right of Station 1239.

8. The district court erred in not holding that the manifest purpose of said paragraph 2.2, to prevent unsightly scars visible from a national forest highway by giving the engineer control over sources, put plaintiff on notice that other sources than those specified might have to be opened.

9. The district court erred in not holding that appellee's inspection of the site, his representation in his bid that he had had independently investigated and thoroughly checked conditions at the site, estopped him from asserting that the government had misrepresented or breached a warranty that there was an adequate supply of suitable material at the source to the right of Station 1239.

10. The district court erred in imposing liability on the government for costs incurred by reason of plaintiff's having to resort to rock sources other than those he had, unilaterally, without

communicating his intentions to the United States or its agents and without making the intentions part and condition of his bid or of the contract, determined to use.

11. The district court erred in holding the government liable for plaintiff's faulty inferences and for unforeseen difficulties encountered on the project.

12. The district court erred in holding that the extra cost of producing crusher run and rock from the source to the right of Station 870 was chargeable to the government.

13. The district court erred in denying the government's motion for directed verdict on the ground that plaintiff's failure to take an appeal to the head of department in accordance with Article 15 of the contract barred recovery of the extra cost of rock production.

14. The district court erred in giving undue effect to testimony that contractors were accustomed to rely on a designation of source as constituting a representation or warranty that an adequate supply of suitable material was available.

15. The district court erred in not holding that plaintiff had waived damages for misrepresentation by proceeding with the work at the quarry right of Station 1239 after representa-

tives of the District Engineer's Office had visited the site and determined it was adequate and suitable.

16. The district court erred in finding that but for the fault of the government plaintiff would have completed his contract within the time limited.

17. The district court erred in not finding that the liquidated damages assessed for plaintiff's delay and the extra expense in reprocessing and reshaping the roadway on his resumption of operations in 1938 were due to plaintiff's failure to commence work on the contract promptly and to prosecute it diligently.

18. The district court erred in finding that plaintiff's failure to complete the project within the time limited in the contract was due to the government's failure to furnish adequate and satisfactory quarries at the source to the right of Station 1239.

19. The district court erred in entering judgment for plaintiff.

ARGUMENT

I

The first four assignments of error will be con-

sidered together because of their similarity and principles of law applicable.

1. THE DISTRICT COURT ERRED IN HOLDING THAT IT RETAINED JURISDICTION UNDER THE TUCKER ACT (ACT OF MARCH 3, 1887, AS AMENDED, JUDICIAL CODE, SECTION 24 (20), TITLE 28 U.S.C. SECTION 41 (20)) AFTER THE COMPLAINT WAS AMENDED DURING TRIAL TO PRESENT CLAIMS EXCEEDING $10,000.00.
2. THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAIMS PRESENTED IN THE AMENDED COMPLAINT DID NOT EXCEED $10,000.00 WITHIN THE MEANING OF THE TUCKER ACT.
3. THE DISTRICT COURT ERRED IN HOLDING THAT A COMPLAINT CONTAINING INTERCHANGEABLE, ALTERNATIVE CLAIMS EXCEEDING $10,000.00 IN THE AGGREGATE IS BROUGHT WITHIN THE LIMITATIONS ON THE JURISDICTION OF DISTRICT COURTS UNDER THE TUCKER ACT BY WAIVER OF JUDGMENT IN EXCESS OF $10,000.00.
4. THE DISTRICT COURT ERRED IN HOLDING THAT THE TUCKER ACT JURISDICTIONAL LIMITATIONS COULD BE CIRCUMVENTED BY PERMITTING AMENDMENT OF THE COMPLAINT FOR THE STATED PURPOSE OF ASSURING JUDGMENT IN THE AMOUNT OF THE JURISDICTIONAL MAXIMUM EVEN IF SOME ITEMS OF CLAIM ALLOWED BY THE DISTRICT COURT WERE DISALLOWED ON APPEAL.

The appellee's amended complaint presented eight

different allegations of damages, aggregating $14,-994.72. (Tr. pp. 15-17) The prayer asked for judgment in the amount of $10,000.00. Title 28, U.S.C., Section 41 (20), commonly known as the Tucker Act, provides that the District Court shall have concurrent jurisdiction with the Court of Claims, of all *claims* not exceeding $10,000.00. It does not provide for jurisdiction of cases where the *judgment* to be rendered does not exceed $10,000.00. Since the government may refuse permission to be sued, it may impose such restrictions on the right to sue it as Congress deems necessary. *Schwab v. United States,* C.C.A. Ill., 17 F. (2d) 34. Statutes which have been enacted by Congress yielding the government's immunity to be sued must necessarily be literally and narrowly construed. *Wallace v. United States,* C.C.A. N. Y., 142 F. (2d) 240.

It is a fundamental principle that the United States may be sued only as it gives its statutory consent, *United States v. Shaw,* 309 U. S. 495, 500-501, and since such a statute relaxes the fundamental principle, it is strictly construed so as not to extend jurisdiction in suits against the United States beyond the exact limitations set up by Congress.[1] *United States v. Sherwood,* 312 U. S. 584; *Munro v. United*

[1] In the case of *Rock Island and Central R. R. v. United States,* 254 U. S. 141, at 143, the court said:

"Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with."

States, 302 U. S. 36, 41; *United States v. Michel,* 282 U. S. 656, 659.

The Tucker Act has given the District Court concurrent jurisdiction with the Court of Claims where the claims shall not exceed the sum of $10,000. It has previously been pointed out that the $10,000 is jurisdictional. The question to be decided is whether or not a person can present a claim comprised of many interchangeable elements of damages aggregating more than $10,000, but have the District Court retain jurisdiction by expressly waiving judgment for any amount over $10,000 without waiving any specific elements or items. In other words, can a party present claims far in excess of $10,000 for determination by the district and appellate courts, until from its reservoir claims up to $10,000 have been allowed. It is elementary that the court passes on the claims it disallows as well as the ones it allows.

The waiver of any excess recovery does not remove objections to the consideration by the district courts of large pooled claims aggregating more than $10,000 when the allowable amount of each is left unascertainable pending judgment in the district and appellate courts. It is true that there are cases which have sustained waivers, (*Hill v. United States,* 40 Fed. 441; *Hedges v. United States,* 42 Fed. (2d) 553; *Hammond-Knowlton v. United States,* 121 Fed. (2d) 192, 202) but these can be easily distinguished from the instant case. In all these cases the claims were re-

duced *pro tanto* before suit. The court only passed on one claim in these cases.

The appellee would have the court pick from his complaint such items of damages as the court might feel he had proved. In this manner the court would be passing on claims in excess of the jurisdictional amount. The court should have required the appellee to elect which elements of damages he would prove or dismiss for want of jurisdiction. In this case of appellee sought to have postponed the selection of the claims to be reduced until a judicial determination had been made. As counsel for the appellee so ably stated to the court his position:

> "MR. LICHTY: The reason is this: That we are presenting to the Court several items of damages. That record I understand you intend to appeal to the Circuit Court of Appeals. If either this Court or the Circuit Court of Appeals can find that there is any damage proved that will sustain a judgment for $10,000.00. I think we are entitled to present it to the Court, and as long as we are waiving any damages in excess of $10,000.00 we are certainly not claiming from the Government in this action more than $10,000.00." (Tr. p. 305)

No case has been found in which the court has decided the precise question presented here. However, doubtlessly, the realization by other claimants of these jurisdictional considerations explain the absence of decisions on the question. Such claimants have apparently filed their actions in the Court of Claims, whose jurisdiction is not open to question or

reduced their claims *pro tanto* before filing suit.

When a plaintiff sues in a court whose jurisdiction does not extend to the full amount of his claim, his waiver or remittal should be of a *specific portion* of it, so that as to the portion of his claim severed or remitted, he will be deemed to have abandoned it, if it is to be brought within the jurisdiction of the court.

21 C.J.S. 88, *Courts,* s 68 (b).

The case at bar can be easily distinguished from *Oliver v. United States,* 149 Fed. (2d) 727, because in that case the distinct claims sued upon could have been the subject of separate suits without splitting a cause of action. In our case there is only one claim, comprised of different elements of damages. It could not be successfully argued that the plaintiff in our case could have brought separate suits for his different elements of damage. Therefore, it would seem that in order to bring it within the jurisdiction of this court the plaintiff would have had to specifically waive some of his elements of damages. Our suit was on a single claim in excess of $10,000 and the district courts have many times held that they did not have jurisdiction of such a suit.

It would appear that there is some tendency in the district court of Oregon to extend the Tucker Act jurisdiction beyond accepted limits. There is now pending on appeal in this court the case of *United States of America v. J. H. Gallagher, et al.*, No. 11066,

in which the district court of Oregon retained jurisdiction under the Tucker Act of a case sounding in tort.

It may be argued that the extension of jurisdiction of the District Court to cover cases similar to the one at bar would not be dangerous. It does run afoul of jurisdictional limitations, for if claimants are permitted to present claims containing many elements of damage and in excess of the jurisdictional limitation, the Court becomes a tribunal which must pass on claims of more than $10,000 in money value. The amount in controversy was $14,994.72 in the case at bar. The appellee sought to prove all of the damages specified so that even if some items of claim allowed by the District Court were disallowed on appeal, the judgment would still stand. We submit that the statute does not give to the District Court such jurisdiction and that it erred in failing to dismiss the action on motion of the appellant.

II

The next five assignments of error will be consolidated for the purposes of this brief.

5. THE DISTRICT COURT ERRED IN HOLDING THAT PARAGRAPH 2.2 OF THE SPECIFICATIONS ATTACHED TO THE CONTRACT WOULD REASONABLY INDUCE THE BELIEF THAT THE ROCK OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239 WOULD BE AD-

EQUATE IN QUANTITY AND SUITABLE IN QUALITY FOR THE PURPOSE INTENDED.

6. THE DISTRICT COURT ERRED IN CONSTRUING SAID PARAGRAPH 2.2 AS CONSTITUTING A REPRESENTATION OR WARRANTY THAT THE ROCK OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239 WOULD BE ADEQUATE IN QUANTITY AND SUITABLE IN QUALITY FOR THE PURPOSE INTENDED.

7. THE DISTRICT COURT ERRED IN NOT HOLDING THAT SAID PARAGRAPH 2.2, READ IN ITS ENTIRETY, EXPRESSLY AS WELL AS BY CLEAR IMPLICATION NEGATIVED ANY REPRESENTATION AND PREVENTED REASONABLE RELIANCE ON THE FIRST SENTENCE THEREIN AS A REPRESENTATION OR WARRANTY THAT AN ADEQUATE SUPPLY OF SUITABLE ROCK WAS OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239.

8. THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE MANIFEST PURPOSE OF SAID PARAGRAPH 2.2, TO PREVENT UNSIGHTLY SCARS VISIBLE FROM A NATIONAL FOREST HIGHWAY BY GIVING THE ENGINEER CONTROL OVER SOURCES, PUT PLAINTTIFF ON NOTICE THAT OTHER SOURCES THAN THOSE SPECIFIED MIGHT HAVE TO BE OPENED.

9. THE DISTRICT COURT ERRED IN NOT HOLDING THAT APPELLEE'S INSPECTION OF THE SITE, HIS REPRESENTATION IN HIS BID THAT HE HAD HAD INDEPENDENTLY INVESTIGATED AND THOROUGHLY CHECKED CONDITIONS

AT THE SITE, ESTOPPED HIM FROM ASSERTING THAT THE GOVERNMENT HAD MISREPRESENTED OR BREACHED A WARRANTY THAT THERE WAS AN ADEQUATE SUPPLY OF SUITABLE MATERIAL AT THE SOURCE TO THE RIGHT OF STATION 1239.

The appellee's contention that paragraph 2.2 was a descriptive representation or warranty upon which he might rely as an assurance that there was an adequate supply of suitable rock at the designated source near Station 1239 was accepted by the court. The government's position is that the provision did not constitute a representation or warranty but merely stated appellee might look to that source for gravel.

A warranty has been defined "as meaning an agreement which refers to the subject matter of the contract, but which is collateral to its main purpose, an engagement or understanding that a certain fact regarding the subject of the contract is, or shall be, as it is declared or promised to be." (Contracts, 17 C.J.S. 795, Sect. 342.)

No particular form of words is necessary to constitute a warranty but it must appear from the language used and the actions of the parties that they intended to enter into a contract of warranty.

Paragraph 2.2 of the specifications provided as follows:

"—2.2 *Sources of Supply.* Gravel for crushing is available approximately 0.5 mile right of Station

> 870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

If the first sentence in Paragraph 2.2 stood alone, possibly in the course of a broad view of how reasonable men would understand a federal contract, a warranty or representation having a proper foundation in law might be worked out by interpolation, to the effect that gravel adequate in quantity and suitable in quality would be obtained from the two designated sources.

> *Girard Trust Company v. United States,* 149 F. (2d) 873.

However, if we look at the entire paragraph and take into consideration other parts of the specifications, only one conclusion can be drawn and that is that the appellant specifically warned the appellee that he might have to acquire gravel from other sources. A provision was inserted that before any other sources were used, the approval of the district engineer must be obtained. This was inserted to prevent unsightly scars visible from a national forest highway. Nothing could have notified the appellee more plainly that it might be necessary to obtain gravel from an additional source.

A further provision was contained in the general specifications (Govt. Ex. No. 22):

> "Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies." (Tr. p. 113)

This provision warned the bidders and the appellee that they would be required to stand all the difficulties incident to the completion of the contract. The specifications pointed out to the bidders where gravel might be obtained, but also informed them that it might be necessary to get it from other places and that bidders were to make their own estimates as to all conditions that might be encountered.

In the case of *MacArthur Bros. Co. v. United States,* 258 U. S. 6, 11-13, an action arising out of a breach of contract for an alleged misrepresentation, the court pointed out in its opinion:

> —"But in reality there was no representation by the Government nor is it alleged that the Government had knowledge of the conditions or means of knowledge superior to the knowledge of the Company. The latter acquired knowledge only by the aid of divers as its work progressed. Such being the situation, does not the case present one of misfortune rather than misrepresentation?—There was indication of the manner of performance but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such cir-

> cumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking."

The appellee contends that he relied on the Government's representation or warranty that gravel of sufficient quantity and quality could be obtained from the stations designated. However, in his testimony he admitted that he had checked the site very carefully and that it appeared to him that there was sufficient gravel present at the designated spots. He further testified that no one could have possibly known that the gravel would turn out to be soft underneath. He stated that both he and the Government had equal knowledge of the facilities. (Tr. pp. 114, 115)

The appellee would have the court construe the word "available" to mean an insurer of both quantity and quality of gravel. It certainly cannot be said that gravel was not available at both designated places, because 24,890 tons were produced at station 870 (Tr. pp. 182, 221) and 20,097 tons at Upper Bear Creek on Station 1239. (Tr. pp. 183, 217) The mere statement that gravel and rock are available does not imply that an unlimited quantity exists nor a gravel of a specific quality. *Simpson v. United States,* 172 U. S. 372, 380.

The appellee contends that he could reasonably rely on the assumption of an adequate quantity and quality from the designated sources. All evidence points to the contrary and that any reliance that the appellee placed upon the designations was not a reasonable reliance. A faulty inference differs from the descriptive representation. *MacArthur v. United States, supra.*

A misled contractor cannot count on a breach of warranty when the fault is his own. There was no positive, unequivocal, and definite representation as to quantity and quality. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day v. United States,* 245 U. S. 159; *Phoenix Bridge Co. v. United States,* 211 U. S. 188.

Had the contract and specifications provided that *all* gravel necessary for crushing was available at certain designated stations, then the case would be brought within the principle as announced in the following cases:

Christie v. United States, 237 U. S. 234;
Hollerbach v. United States, 233 U. S. 165;
Spearin v. United States, 248 U. S. 133.

However, in our case no definite amount was provided and the specifications specifically called to the attention of the appellee that it might be necessary to seek other sources of supply.

The instant case seems to involve unforeseen difficulties rather than defects in the specifications. We therefore reach the conclusion that:

1. There was no representation or warranty as to the quantity or quality of material at the designated stations.
2. That even if there were such a representation or warranty, the appellee could not have reasonably relied upon it.
3. That even if there were such a representation or warranty and if, further, the appellee reasonably relied upon it, that it was not false, because 24,890 tons were removed from one station and 20,087 tons from the other before any difficulty was encountered and that this satisfied the warranty.

III

13. THE DISTRICT COURT ERRED IN DENYING THE GOVERNMENT'S MOTION FOR DIRECTED VERDICT ON THE GROUND THAT PLAINTIFF'S FAILURE TO TAKE AN APPEAL TO THE HEAD OF DEPARTMENT IN ACCORDANCE WITH ARTICLE 15 OF THE CONTRACT BARRED RECOVERY OF THE EXTRA COST OF ROCK PRODUCTION.

Even if all the foregoing argument is not well taken, there is one further objection that precludes the appellee from recovering in this action. The appellant and appellee entered into a contract which, among other things, contained the following provision:

"Article 15. *Disputes.*—Except as otherwise spe-

> cifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appellee by his counsel admitted that no appeal was made from any ruling at any time. (Tr. p. 124) The interested parties saw fit to provide in the contract an orderly and intelligent means of adjusting disputes. Special appeal provisions were provided for in the contract under which differences could be ironed out and expense of litigation avoided. We believe that the rule forbidding collateral attack on orders which have become final are, of course, essential to the orderly administration of justice. If after ignoring special review and appeal procedures, a litigant can challenge an order or ruling in any court under any circumstances, all special procedures provided by the contract become interesting but futile gestures toward the more intelligent handling of litigation. Unless such provisions are respected and followed every attempt to improve Government contracts by the use of special appeal procedures will be defeated at the outset.

Appellee contended while he was performing his contract and afterwards that he had been caused an

additional expense because of the unforeseen conditions. Appellee waited five months after completing his contract before he made any claim for damages. This was denied and he then waited over two years before taking any further appeal. We believe that his failure to seek the relief provided for in his contract implied a decision, on his part, to accept the conclusion of the head of the department.

A dispute concerning a question of fact certainly arose under the contract. The appellant contended the quarry was available if the appellee used it in the right manner. The appellee contended that the quarry was not as represented and that it caused him great additional expense.

It must be assumed that had the appellee followed the provisions of his contract, he would have secured adequate relief. There certainly is nothing in the record to indicate the appellant or its representatives acted arbitrarily or capriciously. It most certainly would have reduced the expenses for all parties concerned.

In a very recent case the Supreme Court had occasion to pass on the very question we are concerned with now. In the case of *United States v. Blair, et al.*, 321 U. S. 730, 735, 736, the court states:

> "Respondent has thus chosen not to follow the only avenue of relief available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly

set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

* * * * *

"Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts. * * * Then, absent a valid excuse for not appealing the disputed items to the departmental head pursuant to Article 15, respondent cannot assert a claim for damages in the Court of Claims. * * * here we must insist, not that respondent turn square corners, but that he exhaust the ample remedies agreed upon."

Rego Building Corp v. United States, 99 C. Cls. 445.

The Court of Claims, in the very recent case of *George F. Driscoll v. United States,* C. Cls. No. 45455, decided October 1, 1945, had occasion to construe this same Article 15, which appeared in the Appellee's

contract. The Court, in denying relief to the contractor, had this to say:

> "The contracting officer upon consideration of plaintiff's claims of May 3 and June 5 and all the facts submitted by plaintiff, and those obtained as a result of his own investigation, decided that plaintiff, and not the Government, was responsible for locating the water main before driving the pile which resulted in its being broken, and that under all the facts and circumstances plaintiff was responsible for the cost of making necessary repairs and for furnishing the Government with fresh water until the repairs had been completed.
>
> "Plaintiff does not claim and has submitted no proof to show that the decision of the contracting officer was so grossly erroneous as to imply bad faith, and it is clear that such a claim could not be made. Plaintiff argues that the contracting officer's decision was conclusive only as to matters of fact and that the decision which was made consisted merely of conclusions of law. It is contended that the decision was not final as to matters of law relating to the interpretation of the contract. Under article 15 this contention cannot be sustained. The decision of the contracting officer consisted of a decision on matters of fact, as well as matters relating to the proper interpretation of the contract, drawings, and specifications, and his authority to decide the dispute included both questions.
>
> "We think the claim which plaintiff made to the contracting officer, and which it makes here, involves a dispute which arose under the contract which the contracting officer was not only authorized but was required to decide under the provisions of article 15. Except for this, plaintiff would be entitled under the findings to recover $7,787.12, as set forth in findings 16 and 17.

> However, we are of the opinion that the decision of the contracting officer, from which plaintiff took no appeal, was final."

In the case of *Silas Mason v. United States*, decided the same day, C. Cls. No. 44659, the Court remarked, in further construing Article 15:

> "We recognize that there may be disputes to which by fair construction of Article 15, it is not intended to apply. For example, in the form in which Article 15 is frequently written, it applies only to disputes concerning 'question of fact.' When so written, it would not, of course, bind the contractor to resort to, nor the government to accord, administrative determination of disputes concerning questions of law. But Article 15 as written in the plaintiffs' contract applied, . . . to 'all . . . disputes concerning questions under this contract.' We think, therefore, that the plaintiffs were required to submit all the disputes upon which this suit is based, to the stipulated administrative procedure."

A very close analogy can be drawn between the question now presented and in the cases where a special assessment is levied against an individual. Where the individual is given an opportunity to be heard and present argument against the planned assesment, and he fails to take advantage of this provision, he cannot later be heard to say that such assessments are unconstitutional.

> *Milheim et al. v. Moffat Tunnel Improvement District et al.*, 262 U. S. 710, 723, 724;
> *Farncomb et al. v. City and County of Denver et al.*, 252 U. S. 7, 11, 12;

Utley et al. v. St. Petersburg, 292 U. S. 106, 109.

The appellee failed to observe the terms of the contract into which he entered. Over four years after completion of the work and more than two years from the last complaint to the head of the department, he brought this suit for damages. We believe that the appellee is barred by his own contract from now asking a court to award him damages. If not barred, his conduct has certainly estopped him from now maintaining this action.

IV

17. THE DISTRICT COURT ERRED IN NOT FINDING THAT THE LIQUIDATED DAMAGES ASSESSED FOR PLAINTIFF'S DELAY AND THE EXTRA EXPENSE IN REPROCESSING AND RESHAPING THE ROADWAY ON HIS RESUMPTION OF OPERATIONS IN 1938 WERE DUE TO PLAINTIFF'S FAILURE TO COMMENCE WORK ON THE CONTRACT PROMPTLY AND TO PROSECUTE IT DILIGENTLY.

The District Court allowed appellee $2,850.17 damages for reprocessing and reshaping the roadways and gutters in 1938. (Tr. pp. 40, 41) This work had previously been done by appellee in 1937 but due to winter weather conditions, it was necessary to do it again in 1938 before completing the work.

We feel that the Court erred in allowing the appellee any damages on this account because the con-

tract did not require that the appellee do this work until the project was completed. Of course, the appellee is not entitled to damages for work performed by him, but not required under the contract. The appellee's work was not accepted until August 2, 1938. Any work done by the appellee before this time had not been accepted. It is the appellant's position that the appellee never should have done the work unless he could have finished the project in 1937. There was an equal showing on the Government's part that the appellee's failure to proceed diligently prevented completion of the work in 1937 and was as great a reason for his losses as the lack of quality gravel.

V

10. THE DISTRICT COURT ERRED IN IMPOSING LIABILITY ON THE GOVERNMENT FOR COSTS INCURRED BY REASON OF PLAINTIFF'S HAVING TO RESORT TO ROCK SOURCES OTHER THAN THOSE HE HAD, UNILATERALLY WITHOUT COMMUNICATING HIS INTENTIONS TO THE UNITED STATES OR ITS AGENTS AND WITHOUT MAKING THE INTENTIONS PART AND CONDITION OF HIS BID OR OF THE CONTRACT, DETERMINED TO USE.
11. THE DISTRICT COURT ERRED IN HOLDING THE GOVERNMENT LIABLE FOR PLAINTIFF'S FAULTY INFERENCES AND FOR UNFORESEEN DIFFICULTIES ENCOUNTERED ON THE PROJECT.
12. THE DISTRICT COURT ERRED IN HOLD-

ING THAT THE EXTRA COST OF PRODUCING CRUSHER RUN AND ROCK FROM THE SOURCE TO THE RIGHT OF STATION 870 WAS CHARGEABLE TO THE GOVERNMENT.

14. THE DISTRICT COURT ERRED IN GIVING UNDUE EFFECT TO TESTIMONY THAT CONTRACTORS WERE ACCUSTOMED TO RELY ON A DESIGNATION OF SOURCE AS CONSTITUTING A REPRESENTATION OR WARRANTY THAT AN ADEQUATE SUPPLY OF SUITABLE MATERIAL WAS AVAILABLE.

15. THE DISTRICT COURT ERRED IN NOT HOLDING THAT PLAINTIFF HAD WAIVED DAMAGES FOR MISREPRESENTATION BY PROCEEDING WITH THE WORK AT THE QUARRY RIGHT OF STATION 1239 AFTER REPRESENTATIVES OF THE DISTRICT ENGINEERS'S OFFICE HAD VISITED THE SITE AND DETERMINED IT WAS ADEQUATE AND SUITABLE.

16. THE DISTRICT COURT ERRED IN FINDING THAT BUT FOR THE FAULT OF THE GOVERNMENT PLAINTIFF WOULD HAVE COMPLETED HIS CONTRACT WITHIN THE TIME LIMITED.

18. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF'S FAILURE TO COMPLETE THE PROJECT WITHIN THE TIME LIMITED IN THE CONTRACT WAS DUE TO THE GOVERNMENT'S FAILURE TO FURNISH ADEQUATE AND SATISFACTORY QUARRIES AT THE SOURCE TO THE RIGHT OF STATION 1239.

The remaining points will be considered together because they all depend upon one question: whether

the appellee is entitled to damages because of the failure of Station 1239 to provide adequate and suitable gravel.

The contract designated two sources of gravel and rock supply. The positions were designated by the Government because the road was in a national forest highway and it was important to preserve the landscape along the roadway. (Tr. pp. 175, 176) There was no investigation by the Government as to the quantities available. The contract provided that the appellee was to examine the premises and make his own estimates as to conditions present. He testified that he had done this. (Tr. p. 114) The contract expressly provided that other sources might be necessary. There was nothing in the contract that required the appellee to use both designated sources of gravel. There was nothing that informed the appellee that an unlimited supply of gravel could be obtained at either designated source. The insertion of the designated sources was for the appellee's convenience. The Government didn't care where the appellee obtained the gravel so long as it didn't mar the landscape along the highway.

It was the appellee's contention (Tr. pp. 18-19) that "the government would not have provided that he would have to use this rock if they hadn't satisfied themselves thoroughly it was satisfactory," and ". . . if they had not put that in—you might say to produce our own experience if they hadn't done that, but this

lowered our guard and we were entitled to rely on it," and "we assume they stand back of it," and "they say, 'Well, there is a quarry site here, or a gravel pit here,' and so forth and when they do, why, generally those are picked out to be the best and more suitable material generally on the job that is available for the job, so the contractors have got to where they rely on those things, and when they get specifications for a job they immediately look up the sources of the material and if the sources are stated then they go right to those sources and if they look all right, in other words, if they look as though the material is there, there is nobody can see in the ground, one man can't see in the ground any more than another can, and so we look the situation over and if every indication looks favorable that the material is there, or all right and everything, why, we know they have specified it, and we assume they stand back of it, which has been practically the custom, I take it."

This was the plaintiff's testimony and his contentions which support his allegations of damages. It would appear from his own testimony that the Government never made any warranty and that if later on conditions were different from those expected, it was because of the appellee's faulty inferences. The Government had never done any core drilling and couldn't tell. (Tr. p. 24) The appellee figured it was all right from past use and from the surface appearances. Plaintiff's own witness, Hildeburn, (Tr. p. 59)

testified that from the outside "it was a very fine looking quarry . . a beautiful quarry, . . it looked like very nice crushing material." "It had all the earmarks of being a beautiful quarry." (Tr. p. 67)

The appellee's testimony further points to a reckless bid:

> "That had sort of become a custom here for years amongst all the engineers of the country and all the different departments letting public works, that if they were going to furnish the sites, in other words, why, they generally had lots of time to select out these sites, while we never had time to go out there and core drill these quarries, and couldn't neither."

However, the record shows that the plaintiff in his bid stated that he had checked the site of the proposed work very carefully. (Tr. pp. 36-37) Bidders were expected to examine the work and decide its character for themselves. *Central Dredging Company, Inc. v. United States,* 94 C.Cls. 1, at page 12. The facts were not peculiarly within the knowledge of the Government's agents. It would seem that what was involved was an unforeseen difficulty and not a defect in the plans or specifications. If there is no misrepresentation or concealment by the Government, there is nothing on which the contractor can claim to have relied. *Cassidy and Gallagher v. United States,* 95 C.Cls. 504. A claim for extra costs due to misrepresentation is not supported by slight differences between materials actually encountered in excavation and those indicated in the specifications. *General*

Contracting Company v. United States, 96 C.Cls. 255.

There is an abundance of testimony that had the appellee set up his equipment promptly and prosecuted his work diligently he would have been able to complete his contract in time in 1937 and that even with the difficulties encountered, had the appellee realized that time was of the essence of the contract he could have completed his contract on the date specified. (Tr. pp. 125, 129, 130)

A total of 4,262 tons of rock out of a total 49,249 tons was taken from a source different from that provided by the contract. (Tr. p. 183) Had the appellee been forced to take all but a thousand tons of rock from the gravel pit the terms of the contract would have been satisfied. However, here practically all of the rock was taken from the designated sources.

Appellee contends, though, that he is entitled to damages of $956.48 for the cost of extra hauling from the gravel pit which would not have been necessary had Station 1239 been adequate. Also $4,618.34 extra cost of producing cover material from the gravel pit which would not have been incurred had Station 1239 been adequate. As we have previously pointed out, there was nothing in the contract that implied there were unlimited quantities of materials at either designated place. The appellee was there and was told to make his own estimates. He cannot be allowed damages now for a result which was due at least in part

to his own failure to properly estimate the difficulties involved.

Appellee also obtained judgment for $1,575, the amount of the liquidated damages assessed against him for his failure to complete the contract on time. The appellee never began work until June 29th and no crushed rock was produced until August 9th. The appellee never at any time recognized that time was of the essence and made no determined effort to complete the contract as provided. He had contracted to do the work in a certain length of time. He was responsible for conditions that arose that neither party knew about previous to the contract. It was incumbent upon the appellee to provide enough men and equipment to complete the work on schedule regardless of the conditions encountered. This he failed to do. He cannot complain now that the Government assessed liquidated damages against him when he contracted with these things in mind. Appellee contends that the failure to complete the contract as provided was due to the Government's failure to provide adequate materials. The appellee was in charge of operations and the Government exerted no control over his operations. It is true that the rock produced had to meet certain specifications. However, the evidence shows that the failure of some rock at the quarry to meet specifications was due at least in part to the method of operation by the appellee. (Tr. p. 191) The appellee was advised as work went slowly

that his time was running out and that it was important to proceed with all haste. (Tr. p. 202)

While it is true the Government informed the appellee that gravel was available at two designated spots, they did not say that unlimited supplies were present. The appellee encountered unforeseen conditions and now contends the Government should be obligated to pay him for his extra costs incurred. If his position is sound, the Government may as well never enter into a contract but merely pay for its work by the day. The Government cannot be made liable for conditions about which it knew nothing and for which the appellee contracted.

VI

19. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF.

If any of the previous arguments are sound, the Court erred in entering judgment for appellee.

CONCLUSION

We respectfully submit the judgment of the District Court should be reversed and an order entered dismissing the action.

CARL C. DONAUGH,
United States Attorney,
506 U. S. Court House,
Portland, Oregon.

J. ROBERT PATTERSON,
Assistant United States Attorney.

40—10-16-45